

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

MICHAEL COOPER and,)
JENNIFER COOPER, individually)
and as parents and guardian of)
E.C., a minor,)

Plaintiffs,)

v.)

C.A. No. 08C-09-164 PLA

THE BOARD OF EDUCATION OF)
THE RED CLAY CONSOLIDATED)
SCHOOL DISTRICT,)
an Agency of the State of Delaware;)
DR. ROBERT J. ANDRZEJEWSKI,)
Individually and as Superintendent;)
LINDA ENNIS, in her capacity as)
principal; and)
BOULDEN BUSES, INC.,)

Defendants.)

UPON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS MICHAEL
AND JENNIFER COOPER'S CLAIM UNDER COUNT IV
GRANTED

Submitted: June 29, 2009

Decided: August 20, 2009

Louis J. Rizzo, Jr., Esq., REGER RIZZO & DARNALL LLP, Wilmington,
Delaware, Attorneys for Plaintiffs.

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Delaware, Attorney for Defendants Red Clay Consolidated School District,
Dr. Robert J. Andrzejewski, and Linda Ennis.

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Wilmington, Delaware, Attorney for Defendant Boulden Buses, Inc.

ABLEMAN, JUDGE

I. Introduction

This personal injury claim arises from the alleged sexual molestation of an elementary-school student, E.C., by another minor, K.F., during their daily school bus rides.¹ The student and her parents filed suit against the school district, various school officials, and the bus company. Plaintiffs assert that the defendants failed to follow statutory requirements that called for them to report prior incidents of sexual misconduct involving K.F. to state police and failed to adequately safeguard E.C. Defendants have moved to dismiss a claim of intentional infliction of emotional distress brought by E.C.'s parents, Michael and Jennifer Cooper ("the Coopers"), arguing that the Coopers' claim is defective because they were not present at the time of the alleged tortious conduct. The Court agrees with the defendants that, in the context of this case, the Coopers cannot bring a direct claim for emotional distress and instead must meet the requirements of a third-party claim, which include establishing that they were present when the alleged tortious conduct took place. Because the Coopers cannot meet the presence requirement, Defendants' Motion to Dismiss Michael and Jennifer Cooper's claims under Count IV of the Complaint will be **GRANTED**.

¹ The Court will not identify the minors involved in this case by their names, in order to protect their privacy.

II. Factual Background²

In 2006, the Coopers enrolled their minor daughter E.C. as a first-grader at Heritage Elementary School (“Heritage”) in the Red Clay Consolidated School District (“RCCSD”). During 2006 and 2007, RCCSD contracted with Boulden Buses, Inc. (“Boulden”) for student transportation services. E.C. was assigned to Boulden bus number 51 for the school year. The plaintiffs claim that between December 2006 and April 2007, E.C. was repeatedly molested during her weekday bus rides by another minor student on the bus, K.F. The plaintiffs assert that E.C. has endured mental pain and suffering as a result of her sexual assault and is experiencing Post-Traumatic Stress Disorder.

According to Plaintiffs, the defendants were or should have been aware that K.F. had previously engaged in sexual misconduct against a fellow student on bus 51. In late 2006, K.F. allegedly molested T.W., another minor student who rode bus 51. T.W. notified Linda Ennis (“Ennis”), Heritage’s principal, regarding K.F.’s sexual misconduct. Although the record before the Court is unclear as to what actions Ennis

² For the purposes of determining this motion, the facts will be drawn in the light most favorable to the plaintiffs. *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

took in response, it appears that Ennis may have instructed the driver of bus 51 to place K.F. in an assigned seat directly behind the driver's seat.

Despite Ennis's instructions, K.F. continued to move around bus 51, including on the occasions during which he molested E.C. Plaintiffs contend that Ennis "instituted no additional safeguards or safety measures to ensure that K.F. would remain in his assigned seat" and failed to comply with 14 *Del. C.* § 4112, which requires a school principal to report sexual assaults and certain other crimes to the Delaware State Police and the Delaware Department of Education.³

In September 2008, Plaintiffs filed suit in this Court against the RCCSD Board of Education; RCCSD superintendent Dr. Robert J Andrzejewski; Linda Ennis; and Boulden. The following claims were brought on behalf of E.C.: gross negligence against all defendants (Count I); negligence and gross negligence against Boulden for failure to protect her safety during transport (Count II); and negligent supervision and gross negligence against Dr. Andrzejewski (Count III). In addition, the plaintiffs asserted claims of intentional infliction of emotional distress against all defendants, alleging that E.C., Michael Cooper, and Jennifer Cooper as individuals each suffered physical or emotional injuries as a result of the

³ Docket 1 (Compl.), ¶ 14, 17.

defendants' grossly negligent, intentional, or reckless conduct (Count IV). Finally, the Coopers asserted a claim of intentional infliction of emotional distress against all defendants on the basis that they have incurred and will continue to incur medical and therapeutic expenses associated with E.C.'s injuries (Count V). Now before the Court is Defendants' Motion to Dismiss the Coopers' claim for intentional infliction of emotional distress under Count IV.⁴

III. Contentions of the Parties

In the instant motion, the defendants argue that the Coopers cannot satisfy the elements of a claim for intentional infliction of emotional distress because, as E.C.'s immediate family members, they must be able to prove that they were present during the tortious conduct. Because the Coopers were not present when the conduct occurred and did not allege in the Complaint that the defendants acted with intent towards them (as opposed to

⁴ The Motion does not identify which of the Coopers' intentional infliction of emotional distress claims are at issue. Because all parties have framed their arguments as related to the Coopers' direct claim and the applicability of the presence requirement for third-party emotional distress claims, the Court will construe the motion as relating only to the Coopers' claim under Count IV. The Coopers' claim under Count V, relating to medical and therapeutic expenses incurred on E.C.'s behalf, implicates a different theory of recovery. *See, e.g., Doe v. Montessori Sch. of Lake Forest*, 678 N.E.2d 1082, 1092 (Ill. App. Ct. 1997) ("One who, by reason of her or his tortious conduct, is liable to a minor child for illness or other bodily harm is subject to liability to . . . the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for the treatment during the child's minority." (citing RESTATEMENT (SECOND) OF TORTS § 703 (1977))).

E.C.), Defendants ask the Court to apply the presence requirement to bar the Coopers' claim.

In response, Plaintiffs suggest that the defendants have misapprehend the nature of the Coopers' claim. The Coopers dispute that they have brought a "bystander" or third-party claim that would require them to establish that they were present as the tortious conduct occurred. Rather, they contend that "[t]he intentional conduct which is referenced in the Complaint and forms the basis of the intentional infliction of emotional distress claim is the conduct of the Defendants themselves in intentionally and/or recklessly supervising and safeguarding the children under their care," not the sexually abusive conduct of the minor K.F.⁵ Plaintiffs argue that the defendants' actions constitute outrageous conduct against the Coopers and thus provide the basis for a valid claim of intentional infliction of emotional distress.

IV. Standard of Review

Upon a motion to dismiss, the Court's role is to determine "whether [the] plaintiff[s] may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."⁶ If recovery is

⁵ Docket 20 (Pls.' Resp. to Defs.' Mot.), ¶ 3.

⁶ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

possible, the Court must deny the motion to dismiss.⁷ When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.⁸ In addition, every reasonable factual inference will be drawn in favor of the plaintiffs.⁹

V. Analysis

Delaware applies Restatement (Second) of Torts § 46 in defining the elements of intentional infliction of emotional distress as follows:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.¹⁰

Notably, the Restatement imposes different requirements depending upon whether the defendant's conduct was "directed at" the plaintiff or a third

⁷ *Id.*

⁸ *Id.*; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007).

⁹ *Doe v. Cahill*, 884 A.2d at 458.

¹⁰ *See, e.g., Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990); *Doe v. Green*, 2008 WL 282319, at *2 (Del. Super. Jan. 30, 2008).

person. Subsection 1 applies to plaintiffs who were directly targeted by the defendant's conduct, whereas subsection 2 applies to so-called bystander or third-party plaintiffs. If the party bringing a claim was not directly targeted by the tortious conduct but is an immediate family member of a direct victim, the plaintiff generally must show that he or she was present when the conduct occurred in order to recover. As the comments to Restatement § 46 explain, this presence limitation "may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford."¹¹ Nevertheless, the comments "leave open the possibility of situations in which presence at the time may not be required."¹²

In *Doe v. Green*, this Court addressed the presence requirement in the context of a parent's intentional infliction of emotional distress claim arising from the molestation of her minor child.¹³ In that case, the minor's mother,

¹¹ RESTATEMENT (SECOND) OF TORTS § 46 cmt 1.

¹² *Id.*

¹³ 2008 WL 282319 (Del. Super. Jan. 30, 2008).

Clements, brought an intentional infliction of emotional distress claim after discovering that an adult neighbor who babysat her children had sexually abused her daughter on numerous occasions. Clements had not been present when the sexual abuse occurred.¹⁴ The defendant sought summary judgment as to Clements's intentional infliction of emotional distress claim on the grounds that the claim did not fit within either subsection of Restatement § 46: Subsection 1 was inapplicable because the defendant's conduct was not intended to cause Clements harm, and Subsection 2 was not satisfied because Clements was not present at the time her daughter was abused.¹⁵

The Court in *Doe* accepted the defendant's arguments and declined to relax the presence requirement of Subsection 2(A). In explaining its rationale, the Court emphasized that an individual who was not present during the defendant's conduct can reasonably be expected to experience a different reaction than one who was present:

Presence is a crucial element of the tort because an individual who witnesses outrageous or shocking conduct directed at a third-party has no time in which to prepare himself/herself for the immediate emotional impact of such conduct. Moreover, the actor can reasonably be expected to know of the emotional effect which his or her conduct is likely to produce where the person is present. By way of comparison, the emotional effects are generally lessened where the individual learns of the

¹⁴ *Id.* at *1.

¹⁵ *Id.* at *2.

outrageous conduct long after its occurrence and by means other than through his or her own personal observations. Presence is therefore an essential element which must be established to successfully set forth a cause of action for intentional infliction of emotional distress.¹⁶

Although a minority of jurisdictions have taken a more flexible approach to the presence requirement, or even waived it in certain cases, the *Doe* Court concluded that presence remained a necessary element of the tort on the facts before it.¹⁷

Here, the plaintiffs contest the relevance of *Doe v. Green*. The Coopers urge the Court to consider their claim in light of *Farmer v. Wilson*, in which this Court implicitly found that a father could maintain an action for intentional infliction of emotional distress under Subsection 1 against school officials who removed his minor daughter from class without his consent and drove her to a medical examination to enable her to participate on the school track team.¹⁸ Although the defendants successfully moved for summary judgment on the basis that plaintiff Farmer could not establish the elements of outrageous conduct or severe emotional distress, the Coopers argue that the crucial portion of *Farmer* was the Court's willingness to

¹⁶ *Id.* (quoting WILLIAM L. PROSSER ET AL., THE LAW OF TORTS §12 (5th ed. 1984)).

¹⁷ *Id.*

¹⁸ 1992 WL 331450 (Del. Super. Sept. 29, 1992).

analyze the father as a “direct” plaintiff, rather than applying the requirements of Subsection 2. The Coopers rely on *Farmer* to suggest that parents may maintain a Subsection 1 claim for “outrageous conduct” involving intentional or reckless failures to supervise and safeguard a child.

The Coopers’ argument that their claim should be analyzed under Subsection 1 of Restatement § 46 is an understandable attempt to avoid *Doe v. Green*, but ultimately fails. As a general principle, courts will “not consider a plaintiff to be a direct victim of the defendant’s conduct where that conduct more directly targeted another victim.”¹⁹ Here, it is clear that the defendants’ alleged tortious conduct was primarily directed at E.C., not the Coopers. That the plaintiffs in this case have not brought suit against the abuser himself is a distinction without a difference. The plaintiffs’ Complaint and their Response to the instant motion repeatedly assert that the defendants violated protective duties owed to *E.C.*, not her parents. If the plaintiffs’ theory of the case is accepted as true, it was E.C. who was molested as the result of the defendants’ acts and omissions. The Coopers learned of the consequences of the defendants’ alleged tortious conduct after the fact.

¹⁹ *Bettis v. Islamic Repub. of Iran*, 315 F.3d 325, 335 (D.C. Cir. 2003).

Moreover, crucial factual differences between *Farmer* and this case convince the Court that *Farmer* is inapposite. Assuming that Farmer could have established that the school officials acted outrageously and that his resulting emotional distress was extreme, there were no apparent targets of the conduct at issue in that case other than the parents of the minor student. The student herself had left school willingly for what was by all accounts a routine medical examination, to which she consented. Thus, the father's claim was properly viewed under Subsection 1 not because he had alleged that the defendants' conduct was extreme and outrageous—indeed, extreme and outrageous conduct by the defendant is a necessary element under both Subsections 1 and 2—but rather because the conduct was “directed at” him. In this case, by contrast to *Farmer*, the defendants' alleged conduct targeted E.C. much more directly than it did her parents. Thus, *Farmer* offers little guidance for the Court's analysis here.

In essence, the Coopers' arguments highlight the fact that they are at least arguably foreseeable victims of the defendants' alleged tortious conduct. The Court is sympathetic to the viewpoint that conduct which places a six-year-old child at risk of sexual molestation could reasonably be expected to cause extreme emotional distress to her parents as well. The Restatement and case law make clear, however, that foreseeability alone

does not determine whether a claim falls under subsection 1 or 2. That the Coopers might foreseeably have been caused emotional distress by the alleged tortious conduct does not imply that the defendants' actions were "directed at" them to the same extent that it directly targeted E.C. To confound these concepts and consider all family members foreseeably affected by a defendant's tortious conduct towards another as "direct victims" would "completely undermine the 'presence' and 'immediate family' requirements of § 46(2)."²⁰

Because the Coopers cannot establish that the defendants' conduct was "directed at" them within the meaning of Restatement § 46, they cannot meet the requirements for a direct claim of intentional infliction of emotional distress under Subsection 1 of the Restatement definition. The Coopers were not present when the defendants' conduct occurred, nor when E.C. was allegedly molested, and therefore they cannot proceed with a third-party claim under Subsection 2. Accordingly, the Coopers' claim for intentional infliction of emotional distress under Count IV must be dismissed.

²⁰ *Shemenski v. Chapiesky*, 2003 WL 21799941, at *3 (N.D. Ill. July 30, 2003).

VI. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss Jennifer and Michael Cooper's claim for intentional infliction of emotional distress under Count IV of the Complaint is hereby **GRANTED**.

IT IS SO ORDERED.

/s/

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Louis J. Rizzo, Esq.
Timothy S. Martin, Esq.
Sherry Ruggiero Fallon, Esq.